BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS NEWTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 145,831
CROMWELL CONSTRUCTION INC.	)	
Respondent	)	
AND	)	
	)	
CIGNA INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

ON the 2nd day of December, 1993, the application of respondent and its insurance carrier for review by the Appeals Board of an Award by Administrative Law Judge James R. Ward dated October 18, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by his attorney, Richard F. Waters, of Junction City, Kansas. The respondent and its insurance carrier appeared by their attorney, Mickey W. Mosier, of Salina, Kansas. The Kansas Workers Compensation fund appeared by its attorney, David G. Shriver, of McPherson, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as stated in the Award of October 18, 1993.

STIPULATIONS

The Appeals Board adopts and incorporates by reference the stipulations stated by the Administrative Law Judge in the Award of October 18, 1993.

ISSUES

The issues presented by oral argument to the Appeals Board were:

(1) Whether claimant met with personal injury by accident arising out of and in the course of his employment;

(2) Nature and extent of claimant's disability, if any;

(3) Whether the Fund should be liable for all or a portion of the award.

Respondent also listed average weekly wage as an issue in its application for review by the Appeals Board. The issue before the Administrative Law Judge was whether the value of claimant's lodging while working out of town and reimbursement for meals should be included in the wage. On the basis of Ridgway v. Board of Ford County Comm'rs, 12 Kan. App. 2d 441, 444, 748 P.2d 891 (1987), the Administrative Law Judge found that the payment for meals was an economic benefit and the value should be included as part of the wage. Conversely, the payment directly to the motel as reimbursement for lodging while out of town was not an economic benefit to the claimant and accordingly its value would not be included. The Appeals Board agrees with this finding under the circumstances in this case and hereby adopts the wage found by the Administrative Law Judge of $377.88 per week.

The Appeals Board also adopts the Administrative Law Judge's finding regarding credit pursuant to K.S.A. 44-510e. Specifically, the Appeals Board finds the respondent would be entitled to a 100 percent credit which amounts to 44 weeks of credit at $71.79 per week.

The Appeals Board also hereby adopts all other findings and conclusions made by the Administrative Law Judge which are not inconsistent with the findings expressly made by the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Claimant did meet with personal injury by accident arising out of and in the course of his employment on May 10, 1990.

Although there is reason to question claimant's testimony regarding his accident, the Appeals Board finds, based upon the record as a whole, the questions are adequately answered and more probably than not claimant suffered accidental injury as he testified on May 10, 1990. Claimant testified that he injured his back while working at a grain elevator in Iowa when the wind caught an eight-foot lid he was trying to hand to another employee. He indicated that his back twisted and he felt something give in his back. This occurred on a Thursday afternoon before a three-day weekend. He rode approximately 380 miles home with other employees and he testified that he could feel something was wrong with his back but he didn't think it was that serious. He indicated he had a friend take him in the company truck because his back was stiff.

The reasons for questioning this story are found in his failure to make a report of the accident. The evidence indicates, in fact, that his wife called in the following week and advised the employer that he was staying home because he was sick with a virus. It was not until after he had gone to a physician on his own that he did advise his employer the next week of the injury and requested that the employer provide medical care.

Claimant and his wife testified that he did not report the accident initially because he did not think it was serious and because he was concerned about the consequences it might have on his continued employment. Claimant had experienced another back injury in 1984 and had not worked for some three years before going to work for the respondent. He testified he had tried to find other employment but had on several occasions been turned down because he had informed them of his back injury. He worked for the respondent for approximately eight weeks without any apparent difficulty before the May 10, 1990 accident. He did not return to work for the respondent after May 10, 1990. On balance the Appeals Board finds the claimant has met his burden of establishing that he suffered an accidental injury on the date claimed and that said injury arose out of and in the course of his employment with the respondent.

(2) The Appeals Board finds claimant is entitled to benefits based upon a 36 percent general body functional disability. Claimant has not established entitlement to a work disability based upon the record and evidence presented.

Following the May 10, 1990 injury at issue in this case, claimant was treated by Dr. Manguoglu. After conservative treatment Dr. Manguoglu released the claimant to work in August, 1990, with a 50 pound weight limit restriction. Claimant did not return to work for respondent but testified that he did attempt to work at a job which required that he measure ditches for a backhoe operator. He also worked for about a week
rebuilding pallets. He indicated both jobs were too difficult for him to continue. Because of the continued difficulties with the low back claimant attempted first to return to Dr. Manguoglu and when he was not available went in January, 1991, to Dr. Howell. From

testing done, Dr. Howell found reason to and did perform a fusion at L4-L5 on April 1, 1991.

Both Dr. Mills and Dr. Howell gave functional disability ratings and indicated they would impose restrictions. Dr. Mills gave claimant a rating of 15 percent disability to the body as a whole. He then testified that 13 percent of this disability preexisted the injury in question and the additional two percent is for the results of the fusion. He then indicates that in his view 15 percent is an appropriate assessment of impairment pursuant to AMA guides. He also indicates that he did not take into consideration such other factors as loss of range of motion. He did not do so in this case because he did not feel he was able to get valid loss of range of motion measurements. Dr. Mills indicated that for restrictions he would limit claimant to lifting no greater than 50 pounds and no repetitious bending or lifting.

Dr. Howell testified generally that he followed AMA guides in arriving at a disability rating of 42 percent. However, he acknowledges that while generally following the guides he also used his own subjective review and evaluation as the treating physician in this case. He further acknowledged that he had not followed the appropriate conversion chart to combine the various factors. He indicates that had he used the combined values chart the disability rating would have been 36 percent rather than 42 percent.

From a review of the record and testimony not only of the doctors but of the claimant as well, the Appeals Board finds that the rating given by the treating doctor, Dr. Howell, is more credible in this case. The Appeals Board does, however, conclude that a combined value calculation should be done and adopts that of the AMA guides to arrive at a 36 percent rating which is the basis for the award in this case. The Appeals Board finds generally that the 15 percent disability rating given by Dr. Mills is inadequate and understates the extent of the disability suffered by the claimant. Dr. Howell's detailed evaluation, on the other hand, appears to reasonably assess and evaluate the claimant's functional disability.

Dr. Howell agreed with the limitations and work restrictions recommended by Dr. Mills. While these limitations and restrictions might under some circumstances, justify an award of a work disability greater than the functional disability, there is not, in this case, any evidence of such greater work disability. No vocational experts testified. The restrictions recommended by the two physicians would not preclude claimant from a variety of types of work. While the Appeals Board would expect there to be some work disability based upon those restrictions, there is no evidence to indicate the extent of the disability or to establish that it is any greater than functional disability. An award is to be based upon functional disability if a greater work disability is not proven. See, Desbien v. Key Milling Co., 3 Kan. App. 2d 43, 588 P.2d 482 (1979).

The Appeals Board makes this determination regarding the percent of disability fully aware claimant had been awarded a higher disability for a 1984 injury to the same area of his low back.

The evidence shows that claimant first suffered low back injury in 1984 while working for a different employer. As a result of his 1984 injury, claimant underwent a laminectomy and disc removal at the L5-S1 level. He had a lateral decompression of L4-5 and S-1. Dr. Anthony E. Francis, the physician who performed the surgery in 1987 testified that prior to the 1987 surgery he would have restricted claimant to lifting not more than 10 to 15 pounds at any one time and would have recommended that he not walk on hard or irregular surfaces, climb ladders or operate dangerous or heavy equipment and that he should not work in environments which vibrate. He further testified that he would have imposed the same restrictions, after his surgery in 1987.

For the injury of 1984, claimant received an initial award of 50 percent permanent partial disability. This award was modified in December, 1988, to an award of temporary total disability at the rate of $178.98 per week. On November 9, 1989, the claimant settled for a lump sum payment of $11,894.03. The settlement represented the payments of $71.79 per week for the remaining weeks and an additional $2,500.00 for future medical or vocational benefits.

In spite of the fact claimant had a higher disability from the prior award, the Appeals Board must consider the evidence in this case. Whether claimant's condition has improved or whether the disability was measured differently, the fact remains in this case, based upon the evidence presented, an award for a 36 percent general body disability is appropriate.

Accordingly, based upon the record as a whole the Appeals Board finds that claimant should be and claimant is hereby awarded disability benefits based upon a rating of 36 percent general bodily disability.

(3) The Appeals Board finds that 100 percent of the award in this case should be assessed against the Kansas Workers Compensation Fund.

Pursuant to K.S.A. 44-567 an employer is to be relieved of any liability for an injury or disability which would not have occurred "but for" a preexisting impairment or handicap when the employer has employed or retained the employee with knowledge of that handicap. Such knowledge is conclusively presumed if the employee knowingly misrepresents that he or she does not have such an impairment or handicap.

The decision to access 100 percent of the liability against the Fund in this case is based therefore upon three separate findings. First, the Appeals Board finds that claimant "knowingly" misrepresented his medical condition at the time he applied for employment with the respondent. Second, the Appeals Board finds claimant's condition was a handicap. Third, the Appeals Board finds the claimant's disability from the May 10, 1990 accident, probably or most likely have occurred "but for" his preexisting disability.

At the time claimant applied for employment with the respondent, Cromwell Construction Company, he completed an application form on which he was asked the following questions: "Are you physically or otherwise unable to perform the duties of the

job for which you are applying?" Claimant answered, "No."

The Administrative Law Judge found that claimant did not by this answer knowingly misrepresent his medical condition. The Appeals Board generally agrees with that portion of the analysis by the Administrative Law Judge which indicates that a "no" answer to this question may be fairly and honestly given even with preexisting disability. The unique facts and circumstances of this case, however, convince the Appeals Board that claimant was, in fact, knowingly misrepresenting his medical condition.

The evidence establishes that after his surgery in 1987 claimant's low back condition did not completely resolve. Dr. Francis' records refer to him as totally disabled in 1989. He had finally settled his prior workers compensation claim in November, 1989. He filled out the application for employment with respondent on January 27, 1990 and saw Dr. Francis for, among other things, pain in his low back approximately two weeks later on February 13, 1990.

Claimant acknowledges in his testimony that he had been turned down for previous employment because he had acknowledged his prior back injury at the time he applied. When the claimant was first asked about his application at Cromwell, he testified:

"Q. What did you do as far as your prior workers compensation claim or back injury on the job application?

A. I didn't list anything.

Q. Why?

A. I had tried two or three other places and I put down I had a prior back injury and they refused to hire me." (Preliminary Hearing, page 9)

Claimant testified similarly at the regular hearing of October 16, 1992. He was there first asked about restrictions which had been imposed by Dr. Francis prior to his employment by the respondent. Claimant testified:

"Q. Did he give you lifting restrictions?

A. I think it was 25, 30 pounds, something like that, I'm not sure.

Q. Were you to avoid stooping and bending?

A. Yes, I think so.

Q. Did the job with Cromwell Construction violate those restrictions or were they in excess of those restrictions?

A. Well, I guess. I was starving to death, I had to do something, some kind of job -- work." (Regular Hearing, page 33)

He further testified regarding his job application at Cromwell:

"Q. Alright on the job application you filled out for Cromwell, you denied ever having a back injury?

A. Yes.

Q. That was not true, obviously, was it?

A. Yes.

Q. Yes it was not true?

A. Yes. Yeah." (Regular Hearing, page 34)

Under the unique facts and circumstances of this case the Appeals Board finds that claimant did intentionally misrepresent his condition. Even though later testimony discloses that question asked on the application for employment was not as direct as claimant recalled when he testified at the initial hearings, the Appeals Board believes claimant's memory of the events suggests that he was intending at the time to mislead the employer.

The Appeals Board also concludes, from the evidence here, that claimant's preexisting low back condition was a handicap. In 1987 Dr. Francis had performed a disc removal at L5-S1. Claimant was considered totally disabled as late as 1989. He did not work for three years. He was initially awarded a 50 percent permanent partial disability, an award which was modified in December, 1988, to require continued payment of temporary total disability. Claimant did have, the Appeals Board concludes, a handicap of the sort intended to make applicable the provision of K.S.A. 44-567. See, Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987).

The Appeals Board must next determine what, if any, relationship there was between the claimant's prior disability and his injury of May 10, 1990, and disability resulting therefrom. Dr. Howell indicates he could not proportion the disability between the prior and current disability. A rating by Dr. Sl0o for the prior disability was admitted by stipulation. Dr. Howell testified that if you assume Dr. Sloo's rating then somewhere between 10 and 20 percent of Dr. Howell's 42 percent would have been the result of the preexisting condition.

Dr. Mills states clearly his opinion that the injury of May 10, 1990, and resulting disability probably or most likely would not have occurred "but for" the preexisting disability. From the record as a whole, the Appeals Board finds Dr. Mills's testimony on this issue to

be convincing. The history of back difficulties continuing up to the time he applied for work with respondent, the fact that the work done for the respondent/ employer exceeded claimant's restrictions, and the relatively minor nature of the trauma all lend credence to Dr. Mills's conclusion. The Appeals Board does, therefore, find that the injury probably or most likely would not have occurred "but for" the preexisting disability and 100 percent of the award should be paid by the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, an award of compensation is hereby made in favor of claimant, Dennis Newton, and against the Kansas Workers Compensation Fund, for temporary total disability compensation at the rate of $251.93 per week, for 48 weeks in the sum of $12,092.64, 44 weeks of compensation at the reduced rate of $18.91 per week, in the total sum of $832.04, and 323 weeks of compensation at the rate of $90.70 per week, in the sum of $29,296.10 for a 36 percent permanent partial disability to the body as a whole, making a total award of $42,220.78. As of January 5, 1994, there would be due and owing to the claimant the sum of $21,903.98. Thereafter, the balance of compensation in the amount of $20,316.80 is payable at the rate of $90.70 per week for 224 weeks, unless otherwise ordered.

Further award is made that claimant is granted future medical on application only.

Further award is made that claimant is referred for vocational rehabilitation which is deferred until his return to the United States.

Claimant's attorney is granted a lien against the proceeds of this award for not more than 25 percent, pursuant to K.S.A. 44-536 (1990).

Reporter's fees are assessed as costs against the Kansas Workers Compensation Fund to be paid direct as follows:

KELLY YORK & ASSOCIATES, LTD.	(Amount Unknown)
RICK L. CONGDEN, C.S.R.	(Amount Unknown)
CURTIS, SCHLOETZER, HEDBERG, FOSTER & ASSOCIATES	$ 150.30
APPINO, BRAKE & ASSOCIATES	$ 152.80
OWENS, BRAKE & ASSOCIATES	$ 453.42

(Plus the costs associated with the deposition of Ruth Cromwell, the amount of which is unknown.)

IT IS SO ORDERED.

Dated this _____ day of January, 1994.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

cc: Richard F. Waters, P.O. Box 848, Junction City, Kansas 66441
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James R . Ward, Administrative Law Judge
George Gomez, Director